IN THE COURT OF APPEALS OF THE STATE OF ALASKA

GARRY PAUL LODOEN, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11466 Trial Court No. 3AN-11-1463 CR MEMORANDUM OPINION No. 6340 — May 25, 2016

Appeal from the Superior Court, Third Judicial District, Anchorage, Paul E. Olson, Judge.

Appearances: Bryon E. Collins, Bryon E. Collins & Associates, Anchorage, for the Appellant. Nancy R. Simel, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, and Allard, Judge.

Judge MANNHEIMER.

In 2008, Howard Haley loaned Garry Paul Lodoen approximately $40,000. In December 2008 and January 2009, Lodoen wrote Haley two checks in partial repayment of the debt — one for $5,000, and the other for $15,000. Lodoen's bank account did not have sufficient funds to cover these checks. Lodoen was later indicted

on two felony counts of issuing a bad check,[1] and he was convicted of these charges following a jury trial.

In this appeal, Lodoen claims that the bad check charges should have been dismissed for pre-indictment delay — because the checks were written in December 2008 and January 2009, but Lodoen was not indicted until March 2011.

The due process clauses of both the Alaska and the United States Constitutions protect an accused against unreasonable pre-accusation delay.[2] But when a defendant claims that they were subjected to unlawful pre-indictment delay, the primary concern is not the length of the delay, but rather the demonstrable harm to the defendant's ability to present a defense.[3] To prevail on such a claim, the defendant must demonstrate "actual and substantial prejudice"[4] — *i.e.*, "a particularized showing that the ... delay was likely to have a specific and substantial adverse impact on the outcome of the case."[5]

In Lodoen's case, the superior court concluded that Lodoen had failed to prove that he was actually prejudiced by the State's delay in procuring his indictment. The superior court's ruling is supported by the record, and we therefore affirm that ruling.

Lodoen also argues that he could not lawfully be convicted of issuing bad checks because the checks in question did not have any bank-processing marks on them — indicating that the victim, Howard Haley, never tried to negotiate the checks.

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1 AS 11.46.280(a) & (d)(2).

2 *State v. Mouser*, 806 P.2d 330, 336 (Alaska App. 1991).

3 *Ibid.*

4 *Id.*, 806 P.2d at 338 (quoting *Wilson v. State*, 756 P.2d 307, 311 (Alaska App. 1988)).

5 *Id.* at 337.

Haley testified that Lodoen had previously given him a check that was refused for payment because of insufficient funds — with the result that Haley had to pay banking fees. To avoid incurring more fees, Haley did not immediately try to cash the checks that Lodoen wrote to him in December 2008 and January 2009. Instead, Haley took these checks to Lodoen's bank to see if Lodoen had sufficient funds in his account to cover the checks. When the bank informed Haley that Lodoen did not have money in his account to cover the checks, Haley did not try to cash the checks.

In any event, Alaska's bad check statute does not require proof that the victim tried to negotiate the bad check. Under AS 11.46.280(a), the crime is complete when a person "issues a check knowing that it will not be honored by the drawee." We therefore reject Lodoen's argument that the lack of processing marks on the two checks constituted a defense to the charges.

Lodoen next argues that the State should have been barred from charging him with any crimes pertaining to the two checks that he wrote to Haley.

Lodoen's argument is based on the fact that in late 2009, at a time when the State was aware that Lodoen had written the checks to Haley, the State reached a plea bargain with Lodoen in an unrelated theft case. Lodoen argues that, because the State was already aware of the Haley checks when the State negotiated this 2009 plea agreement, the State was required to formulate the plea agreement so that it included any potential charges relating to the Haley checks. Lodoen then asserts that, because the 2009 plea agreement failed to mention the two Haley checks, the State became estopped from charging Lodoen with any crimes relating to those two checks.

We are unaware of any law to support Lodoen's theory of estoppel, and we reject Lodoen's argument.

Lodoen also argues that his convictions should be set aside because the State seized property from Lodoen in connection with the unrelated 2009 theft case and

failed to return this property in a timely fashion. Lodoen appears to be arguing that if the State had returned this property to him, he could have sold the property — and, with the resulting funds, he would have been able to at least partially repay the $40,000 that he had borrowed from Haley.

But even if Lodoen was entitled to have the property returned, and even if the State was dilatory in returning the property to Lodoen, this would not be a defense to the charges that Lodoen wrote checks to Haley in December 2008 and January 2009, knowing that he had insufficient funds in his account to cover these checks.

Finally, Lodoen argues (for the first time on appeal) that his convictions should be set aside because, long after he wrote the bad checks to Haley, Lodoen gave Haley a promissory note that was meant to substitute for the bad checks. Lodoen argues that this promissory note "revoked" the bad checks that he had earlier given to Haley, and thus the State lost its ability to prosecute Lodoen for issuing the bad checks.

We reject this argument. Regardless of whether Haley might have relinquished his ability to sue Lodoen over the bad checks when Haley accepted the later promissory note (an issue that we do not decide), the crime of issuing bad checks had already been committed. The issuance of a bad check is a public offense. The State retained its authority to prosecute Lodoen for the two bad checks even if Haley might have later reached an alternative agreement with Lodoen concerning how Lodoen was going to repay his debt to Haley.

For all of these reasons, the judgement of the superior court is AFFIRMED.